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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

WILLIAM ROSS ADEY, *Petitioner*

v.

UNITED ACTION FOR ANIMALS, INC.; ELEANOR SEILING and MACDONALD WHITE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRESS OF STUART E. ADAMS PRINTERS, INC., WASHINGTON, D. C.

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UNITED ACTION FOR ANIMALS, INC.; ELEANOR SEILING and MACDONALD WHITE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William Ross Adey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, p. 1a) is reported at 493 F.2d 1397. The opinion and order of the district court (App. B, *infra*, pp. 2a-17a) is reported at 361 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional standards of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, applicable to suits for libel by public officials and public figures, or the state law standards of *Gertz* v. *Robert Welch, Inc.* (No. 72-617), applicable to suits by private individuals involved in matters of public interest, govern a libel suit by a private scientist who is temporarily involved in a project funded by the federal government.

2. Whether the *New York Times Co.* constitutional standards apply where the defamatory statements are distributed to a small group of subscribers of a private reporting service to which the plaintiff lacks access for purposes of rebuttal.

STATEMENT

Petitioner Adey is a medical doctor and internationally recognized research specialist in diseases of the brain who is employed by the University of California at Los Angeles as Professor of Anatomy and Physiology and as a staff member of the Brain Research Institute (Tr. 110, 144).[2] Dr. Adey has published over

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[1] The ninety-day period for filing the petition for a writ of certiorari (28 U.S.C. 2101(c)) expired on Sunday, June 30, 1974; accordingly, the petition was due and was filed on July 1, 1974. Supreme Court Rule 34(1).

[2] "Tr." references are to the transcript of the trial; "App." references are to the appendix in the court of appeals.

three hundred scientific papers and books in his field of interest, and serves as a consultant to the National Academy of Sciences, National Institute of Health, NASA, the Atomic Energy Commission, and the President's Science Advisory Committee (Tr. 147-148). He is not and has not been an official of any of these government agencies.

Petitioner's principal interests in research at U.C.L.A. have involved the development of techniques of surgical research on animals which can be applied to human patients suffering from epilepsy, Parkinson's disease, and various forms of mental retardation (Tr. 162, 170; App. 124). However, in 1964 petitioner submitted a protocol to NASA involving "a monkey experiment to investigate the long term effects of weightlessness on the central nervous system" (Tr. 193). The experiment was approved and funded by NASA (App. 201).

Petitioner's protocol was supplemented by experiments conducted by scientists at several other universities (Tr. 193-195; Tr. 141). As a culmination of this research, NASA launched a primate into orbit on June 28, 1969, and petitioner coordinated the evaluation of the medical results (App. 142, 170-171). The monkey died shortly after returning to Earth although the scientists involved in the experiment reported that "excellent data" was obtained from sensors in his body (App. 9).

Shortly after the experiment ended, respondent United Action for Animals, Inc. (UAA) distributed a "special report" to its paid membership of approximately 2500 and to affiliated humane societies (App. 27-28). No distribution of this material was made to

the press or to the members of Congress, and no public press release was ever made (App. 79; Tr. 74). While the report criticized the recent experiment, much of it viciously attacked [3] petitioner's work at U.C.L.A. and Oxford University; two representative statements are the following:

> Dr. W. Ross Adey is with the Brain Research Institute of the University of California at Los Angeles (UCLA). He has a long history of abuse of animals * * * .
>
> * * * *
>
> Adey has performed a wide variety of exceedingly cruel animal experiments, including the vibration of live animals with electrodes in their brains in the name of "brain research."

(App. 9, 18).

Following distribution of the report to UAA members, petitioner brought this suit for libel against UAA and two of its officers who prepared the report, respondents Seiling and White.[4] Respondents conceded

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[3] One medical expert at U.C.L.A. described the report in the following terms: "I have seen many articles criticizing science activities or—regarding the use of animals. But never did I see anything so vicious, so malicious as this particular article" (App. 314). As noted below, respondents agreed that numerous statements in the report were defamatory *per se* (App. 26, 340).

[4] Miss Seiling, who wrote the report, testified that she had not completed high school but read many scientific articles, at least "the ones I can understand" (Tr. 50). She admitted she consulted no medical or scientific experts in writing the report, and (1) knew nothing of Dr. Adey's training or specialties except "I knew he used animals in research" (App. 83), (2) knew nothing about Dr. Adey's care of the animals (App. 47; Tr. 15), and

at trial that the statements set forth above among others were defamatory, but contended that they were either true or protected by the doctrine of fair comment under New York law (Pet. App. B, *infra*, p. 5a). Respondents also argued that Dr. Adey could not recover unless he could show the statements were made with knowledge of their falsity or with reckless disregard for the truth, because Dr. Adey

> was acting in a public capacity in that he was supervising an experiment supported by expenditures of public funds appropriated by the Congress and allocated by the National Aeronautics and Space Administration. The matter was likewise one of public interest in view of the involvement of public funds, the widespread public debate and the extensive press coverage. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Defendant's Requested Conclusion of Law 4.

Petitioner, while arguing that "a different standard of proof" *should be* applied to a person in his position (Plaintiff's Post Trial Brief at 21-22), acknowledged that he could "be deemed a 'public figure' or at least a person involved in an event of public interest under the doctrine" of *Rosenbloom* v. *Metromedia, Inc.*, 403

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(3) knew there "is no proof in existence that an animal suffers" in general or specifically in Dr. Adey's experiments (App. 32, 33). Miss Seiling stated that her position was that any experiment is savage and cruel if it doesn't have to be done (App. 63), and suggested that all experiments be done using computers (App. 40), but conceded that her only knowledge of computers was that "I saw one once" (App. 45) and that she knew there was no mathematical model in existence to duplicate Dr. Adey's protocol (App. 46).

U.S. 29.[5] The district court construed this as an "acknowledgment that plaintiff was a public figure and that the flight was a matter of public interest" (Pet. App. B, *infra*, p. 6a), and since the law as it then stood under *Rosenbloom* applied the same Constitutional standard to a public figure and a citizen involved in a matter of public interest, the district court ruled that the actual malice standard of *New York Times Co.* v. *Sullivan* applied (Pet. App. B, *infra*, p. 6a).

Under that standard, the court found that respondents had a "sincere and genuinely held belief" in the truth of their statements, which belief was not "drawn out of thin air or a product of their imaginations" (Pet. App. B, *infra*, p. 13a). The court therefore concluded that petitioner had not met his burden of proving actual malice in the Constitutional sense (Pet. App. B, *infra*, p. 16a). The court also rejected petitioner's contention that the publication of defamatory statements in a private publication distributed to a limited number of subscribers rendered the Constitutional privilege inapplicable, indicating that Dr. Adey could have responded to these statements in the media and by contacting "his professional colleagues and the university community" (Pet. App. B, *infra*, p. 9a).

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[5] Plaintiff's Requested Conclusions of Law 5. As the law stood at the time under *Rosenbloom*, of course, it was legally immaterial whether petitioner was a public figure or a private individual involved in matters of public interest, for in either event the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 was applicable. Accordingly, and in light of the fact that petitioner conceded no more than that he was *either* a public figure or involved in a matter of public interest, the district court's statement that Dr. Adey acknowledged he was one or the other cannot fairly be construed as a factual finding that Dr. Adey was a public figure.

Petitioner appealed, contending principally that he had satisfied the "actual malice" standard, but also preserving the issue that "a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure" (Appellant's Brief at 26).[6] The court of appeals affirmed the decision without opinion (Pet. App. A, *infra*, p. 1a).[7]

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the accorded privately-employed scientists whose research efforts are funded or supported by government agencies, when those efforts become the subject of libelous comment in privately circulated publications. The lower courts concluded that petitioner, whose research into the effect of weightlessness upon the brain and central nervous system was funded in part by NASA, thereby became either a public figure or a private citizen involved in matters of public interest, so that

[6] The brief on appeal stated:

> First, for the reasons set forth in the opinion by Justice Harlan, for himself and three other members of the Supreme Court, in *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 133ff, we believe that a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure. We recognize that the majority of the Supreme Court has, by narrow margins, rejected that position, and therefore we wish merely to preserve the point should either party seek further review of this case.

(Appellant's Brief at 26).

[7] At oral argument, petitioner's counsel specifically asked the court of appeals to defer its decision pending the outcome of *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d 801, certiorari granted, 410 U.S. 925, reversed, No. 72-617, June 25, 1974, then argued and under submission in this Court. However, the court of appeals summarily affirmed without awaiting the decision in *Gertz*.

the actual malice standards of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, as expanded by *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, governed his suit for libel against the respondent corporation.

However, this Court's recent decision in *Gertz* v. *Robert Welch, Inc.,* No. 72-617, decided June 25, 1974, established that "the level of constitutional privilege for defamatory falsehood [varies] with the status of the person defamed" (Slip op. at 9), so there is now a significant difference between the constitutional standards to be met by public officials and public figures on the one hand[8], and private individuals involved in matters of public interest on the other. The district court's statement that petitioner had acknowledged he was a public figure and his project a matter of public interest—based as it was upon petitioner's concession that he was one or the other (see fn. 5, *supra*)—cannot fairly be read as resolving this now-crucial issue. Therefore, the proper course is for this Court to follow "[o]ur well established practice of a remand for reconsideration in the light of a subsequent decision * * * ", *W.M.C.A., Inc.* v. *Simon,* 370 U.S. 190, 191; see Stern and Gressman, *Supreme Court Practice,* § 5.12, p. 221, particularly since petitioner, anticipating *Gertz,* preserved in the court of appeals the point that "a lesser standard of constitutional proof should be applicable where the plaintiff is not a public figure" (Appellate Brief at 26).[9]

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[8] Such individuals were collectively described by Chief Justice Warren in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 165 as "public men."

[9] Even had the issue not been explicitly raised and thus preserved, this Court has made it clear that there can be no waiver of a right which is judicially created after the alleged waiver. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 143 (Harlan, J.).

In addition, because there is lacking here the public distribution of libelous comments which has characterized every such decision to reach this Court since *New York Times Co.* v. *Sullivan, supra,* this case presents the opportunity to decide whether privately distributed libels are protected by the same actual malice standard governing public libels. The Court has often supported application of this standard because the plaintiff "had sufficient access to the means of counterargument" to rebut the libel, *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), and has recognized that "the relative opportunities * * * to rebut defamatory charges might be germaine" to determining the standard, *Time, Inc.* v. *Hill,* 385 U.S. 374, 391, but has never passed upon the question presented here. The lower federal courts, however, have concluded that in certain circumstances libels in privately distributed publications are not entitled to constitutional protection because the plaintiff "lacks the very access to the medium which *Times* and its progeny assumed." *Grove* v. *Dun & Bradstreet, Inc.,* 438 F. 2d 433, 437, certiorari denied, 404 U.S. 898.

1. Without any question the federal government constitutes the largest financial supporter of basic and applied scientific research in private colleges and universities in this country. Public funding of a "sustained, broad-based national effort in science and technology" has substantially increased in recent years,[10]

[10] Message of the President transmitting Reorganization Plan No. 1 of 1973, 38 F.R. 9579, at 5 U.S.C. (Supp. III, 1973) App. II. For example, the appropriations for the National Science Foundation increased from $40,000,000 in 1958 to $495,000,000 in 1968. S. Rep. 1137, 90th Cong., 2d Sess., at 1972 U.S.C.C.A.N. 2644, 2651.

both through research grants from individual agencies such as the Departments of Agriculture, H.E.W., Defense, the Food and Drug Administration and others, and through the activities of the National Science Foundation. The Foundation, for example, is directed

> to initiate and support basic scientific research and programs to strengthen scientific research potential * * * in the mathematical, physical, medical, biological, engineering, social, and other sciences, by making contracts or other arrangements (including grants, loans, and other forms of assistance) to support such scientific activities * * * .

42 U.S.C. (Supp. II, 1972) 1862(a)(1).

In light of this pervasive involvement in funding private scientific projects, the question of whether government support of university research projects converts the scientist involved from a private citizen to a "public official" or a "public figure", who must satisfy constitutional standards of actual malice in libel actions, will become increasingly important. Particularly since, under *Gertz* v. *Robert Welch, Inc.*, the fact that a particular research project involves a matter of public interest no longer mandates the application of the actual malice standard, the question of whether government funding makes the recipient a public figure is significant, and should be decided by this Court.

However, the district court did not clearly resolve this question, because at the time of trial the prevailing rule under *Rosenbloom* v. *Metromedia, Inc., supra,* applied the same standard to matters of public interest as to activities of public figures, and accordingly the court accepted petitioner's concession that he was

one or the other (Pet. App. B, *supra,* p. 9a; see Plaintiff's Requested Conclusion of Law 5, *supra* at 5-6).[11] It may be appropriate, therefore, for this Court to vacate the decision and remand the case for a determination of whether petitioner's participation in a government funded research project rendered him a public figure. See *W.M.C.A., Inc.* v. *Simon, supra,* and cases collected at Stern and Gressman, *Supreme Court Practice, supra,* at 221, n. 32.[12]

The answer to that question is far from clear upon the record before the Court. Under ordinary tort rules applicable to determining who is a public figure, cf. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), that status is normally accorded one "who is famous or infamous because of who he is or what he has done." *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.,* 392 F.2d 417, 419. One who has

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[11] The lower federal courts on numerous occasions have found it unnecessary, as did the district court here, to determine where a libel plaintiff is either a public figure or involved in a matter of public interest. E.g., *Cerrito* v. *Time, Inc.,* 449 F. 2d 306, 307. The trial court in *Gertz, supra,* considered "as a basis for (defendant's) motion" for judgment NOV whether Gertz was a public figure, and concluded it need not reach the issue since the event involved was a matter of public interest. *Gertz* v. *Robert Welch, Inc.,* 322 F. Supp. 997, 998, 999-1000, affirmed, 471 F. 2d 801.

[12] Relying upon *Rosenblatt* v. *Baer,* 383 U.S. 75, the district court at one point suggested that petitioner may have been a public official (Pet. App. B, *infra,* p. 9a). However, *Rosenblatt* is completely inapposite to this case, for it dealt with who "among the hierarchy of government employees" could constitute a public official. 383 U.S. at 85. Petitioner at no time was an employee of NASA or any other government agency. Except for this passing reference, there is no other indication that petitioner could possibly have been considered a government official, even under the most expansive reading of *New York Times Co.* v. *Sullvan* and its progeny.

"taken a strong, publicized and positive position on certain national issues," or who has "sought to influence and lead public opinion" qualifies as a public figure. *Walker* v. *Pulitzer Publishing Co.*, 394 F.2d 800, 805. The category may include, e.g., an author who promotes his book, *Dacey* v. *Florida Bar, Inc.*, 427 F.2d 1292, 1295, or a political campaign manager, *Thompson* v. *Evening Star Newspaper Co.*, 394 F.2d 774, 776, as well as a person whose fame in sports activities or other endeavors brings him constantly before the public, *Spahn* v. *Julian Messner, Inc.*, 18 N.Y. 2d 324, 274 N.Y.S. 877, remanded on other grounds, 387 U.S. 239. Thus, a public figure may attain that status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" or by his "position alone." *Curtis Publishing Co.* v. *Butts, supra,* 338 U.S. at 155 (Harlan, J.).

In *Gertz, supra,* this Court synthesized previous decisions to conclude that public figures were those who achieve general fame or notoriety in the community "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention * * * ." (Slip op. at 18). The Court further explained:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

(Slip op. at 27). Thus it is the public figure's actions to "invite attention and comment" that distinguish him from a private figure, for "the instances of truly involuntary public figures must be exceedingly rare." (Slip op. at 21).[13]

Applying these considerations to the lawyer Gertz, the Court found that "it is plain that petitioner was not a public figure." (Slip op. at 28). Gertz was "well-known in some [professional] circles" but had "achieved no general fame or notoriety in the community" (Slip op. at 28). Similarly, looking to the particular controversy there, Gertz "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome" (Slip op. at 28). Gertz merely carried out his professional duties in an unobtrusive manner, thereby becoming only incidentally entangled in the public debate over the issue of a communist conspiracy against the police.

Viewed against these standards, the case for according "public figure" status to a scientist who receives government funding for his research project in general, and petitioner in particular, is exceedingly weak. First of all, petitioner, while as well-known in the in-

[13] It is precisely this intentional asserting of one's personality or ideas that underlies the imposition of an actual malice standard, for such persons "must accept certain necessary consequences of that involvement in public affairs" and thereby run "the risk of closer personal scrutiny than might otherwise be the case" (Slip op. at 20). This justifies the assumption that "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them" (Slip op. at 21). But "[n]o such assumption is justified with respect to a private individual" (*Ibid.*), and therefore a lower standard of proof in libel cases is appropriate.

ternational medical research community as was Gertz in the Chicago legal community, certainly had achieved "no general fame or notoriety." Had the case been tried to a jury, it seems certain that—as with Gertz—no prospective juror would have "ever heard of petitioner prior to this litigation" (Slip op. at 28). In no way is Dr. Adey analogous to those who have become famous by their "position alone."

Second, while unquestionably petitioner's research into the effects of weightlessness upon the central nervous system, and the experiment launched as a culmination of that research, were of considerable public interest, there is no evidence whatever that Dr. Adey thrust himself "to the forefront of particular public controversies in order to influence the resolution of the issues involved" (Slip op. at 21). For all the record shows, petitioner's only role was in conducting the experiment prior to the launch of the monkey into space, rather than attempting "to engage the public's attention" to influence support of the experiment.

Resolution of these issues, however, should in the first instance be left to the district court as the finder of fact, who will weigh these and other considerations [14] in reaching a decision. The judgment below therefore should be vacated, and the case remanded for further

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[14] In formulating any rule applicable generally to those whose research projects are funded by the federal government, the court may consider the desirability of reaching a result that would require private scientists who accept government funds to expose themselves to personal and professional attacks which involve less than actual malice. Surely, as a matter of policy, any disinclination to accept funding or participate in a project resulting from such considerations disserves the interests of both the individual scientist and the government.

consideration in light of *Gertz* v. *Robert Welch, Inc., supra.*

2. This case also presents the Court with the opportunity to decide whether a constitutional standard other than the actual malice required in cases of public statements is appropriate where the libel is published solely in a privately circulated, subscriber publication. Petitioner asserted below that where, as here, defamatory statements are made not to the general public, but rather are limited in their distribution to private subscribers, the standards of *New York Times Co.* v. *Sullivan, supra* are inapplicable. Cf. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155 (Harlan, J.), noting that the plaintiffs there "had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."

We start from the proposition that, as the Court has indicated, in libel actions "the relative opportunities * * * to rebut defamatory charges might be germaine" in determining the standard the plaintiff must satisfy. *Time, Inc.* v. *Hill,* 385 U.S. 374. This consideration is relevant because where individuals lack access to the medium circulating the falsehood they "are more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz* v. *Robert Welch, Inc., supra,* slip op. at 20. Therefore it is clear that not all publications are entitled to the protection of the actual malice standard in libel cases. See *Grove* v. *Dun & Bradstreet, Inc.,* 438 F. 2d 433, certiorari denied, 404 U.S. 898.

In *Grove, supra,* the court distinguished "between a publication which disseminates news for public con-

sumption and one which provides specialized information to a selective, finite audience." 438 F. 2d at 437. In the later case, a libel plaintiff "is denied that opportunity to respond to such false assertions" because "it lacks the very access to the medium which *Times* and its progeny assumed." *Id.* Accordingly, the court held that defamatory information in a credit rating report delivered only to subscribers did not qualify as "a medium entitled to that extended constitutional protection." *Id.*

While there are obvious differences between a credit report and respondents' "special report," the relevant similarity is that neither are sent to other than subscribers, and no attempt is made to distribute them to the press or public, as were the libels involved in *New York Times Co.* v. *Sullivan, supra,* and decisions following in its footsteps. In each of those cases the libeled plaintiff had access to the public media in which the defamatory material was reported.

However, where publication is made only to a small, specialized group unknown to plaintiff and to which he has no access, obviously he cannot respond, except by going to the public press and thereby giving the libel greater display than it had originally. While of course rebuttal "seldom suffices to undo harm of defamatory falsehood" because "the truth rarely catches up with a lie," *Gertz* v. *Robert Welch, Inc., supra,* slip op. at 20, n. 9, the particular vice of privately published libels is that the plaintiff lacks even the opportunity to respond to the audience receiving the publication. When at the same time the plaintiff is not a public official or public figure who can command virtually automatic media attention, he is hardly in a position to answer

the libel by the "robust debate" contemplated by *New York Times Co.* v. *Sullivan.*

The district court's reasons for refusing to explore these considerations, especially its statement that it lacked the authority to do so without express guidance from this Court (Pet. App. B, *infra,* p. 8a), are patently insubstantial. Certainly the confidential nature of the credit rating material found unprotected in *Grove* is unimportant, because it is the publisher of the defamatory material itself who labels it confidential and limits its distribution.[15] That respondents here were not so careful as Dun & Bradstreet to prevent non-subscribers from receiving their report is hardly constitutionally significant, and as noted above, petitioner had no realistic way to rebut the information except in the general press, thereby giving the lie more currency.

Nor is it anomalous, as the district court supposed, to protect with the actual malice standard defamatory statements disseminated to the general public by the news media and others, the purpose of which is obviously spirited debate over the matters involved, while imposing a lesser standard upon defamatory material distributed to a small group of subscribers. Speech aimed at a limited, private audience does not require the same level of constitutional protection as that which forms part of the public debate over public issues.

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[15] Under traditional concepts of tort law, it is immaterial, once the fact of publication is established, that the defendant published it only to a limited audience, although the extent of the publication may affect the damages awarded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the judgment of the court of appeals should be vacated, and the case remanded for reconsideration in light of *Gertz* v. *Robert Welch, Inc., supra.*

Respectfully submitted,

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JULY, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of April one thousand nine hundred and seventy-four.

Present:

HON. PAUL R. HAYS
HON. JAMES L. OAKES
Circuit Judges

HON. A. SHERMAN CHRISTENSEN
District Judge

73-2234

WILLIAM ROSS ADEY, *Plaintiff-Appellant,*

v.

UNITED ACTION FOR ANIMALS, INC., ELEANOR SEILING AND MACDONALD WHITE, *Defendants-Appellees*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civil 2724

39612

WILLIAM ROSS ADEY, *Plaintiff*,

v.

UNITED ACTION FOR ANIMALS INC., and ELEANOR SEILING and MACDONALD WHITE, *Defendants*

Opinion Findings of Fact and Conclusions of Law

EDWARD WEINFELD, D. J.

A monkey's flight into space has landed in this Court as a libel suit because of its diversity jurisdiction. It is the aftermath of an experimental trip in which a fourteen pound monkey nicknamed "Bonny, The Space Monkey" was propelled into earth orbit on June 28, 1969. Bonny was strapped to a couch within a small space capsule. Its bonds permitted movement of its arms and head and slight movement of its legs. The animal was heavily instrumented with several electrodes inserted into its brain, devices for measurement of blood pressure, heart rate and respiration attached, and a catheter inserted in its urinary tract. The trip, planned to last thirty days and designed to test the effect of prolonged weightlessness upon the monkey's sleep patterns and certain other physiological functions, came to a premature and ill-fated end when after eight days in space the monkey's condition began to deteriorate rapidly and it was brought to earth, where it soon died.

The plaintiff is a doctor and a professor engaged in medical research; he is the director of the Space Biology Laboratory of the Brain Research Institute at the University of California. He is a consultant to the National

Aeronautics and Space Administration (NASA), which sponsored the trip; he was intimately involved in the planning and execution of the Bonny mission and prepared Bonny for the flight.

The defendants are Eleanor Seiling and MacDonald White, two ladies with rather strong views in opposition to the use of animals for experimentation purposes. They are founders, and respectively the unpaid president and vice president, of the defendant United Action for Animals, Inc. (UAA), a national nonprofit organization dedicated to the welfare of animals, with a membership of approximately 2,500.

Within a month after the flight, the defendants, in July 1969, published and caused to be distributed to the membership of UAA and to about 500 humane societies two documents entitled "Call to Action" and "UAA Report—Special Edition—The Ordeal of Bonny, the Space Monkey." The first urged the readers to write to their congressmen to "insist" that funds for animal experimentation be cut off. The second, the Report, consisted of fourteen printed pages and contained photographs and a commentary on the Bonny flight. The specific statements in those two publications upon which plaintiff based his claim upon filing his suit are:

> a. "Thus, for all Adey's expensive instrumentation and 'excellent data,' he really didn't know what was going on in his experiment, much less possess control over it. For any experiment to be *scientific*, it is absolutely essential that the experimenter be in full control of it. Adey's remark [1] calls into question the level of his own competence and the reliability of his techniques when he can express such satisfaction with data which fails to explain the most significant event of his experiment: Bonny's death." (Report, p. 3)

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[1] This referred to a public statement attributed to Dr. Adey: "It is a complete mystery to me personally why the monkey should have gone so soon so fast."

b. "Dr. W. Ross Adey is with the Brain Research Institute of the University of California at Los Angeles (UCLA). He has a long history of abuse of animals . . ." (Report, p. 3)

c. "The catheter in Bonny's bladder was supposed to measure the body's chemical changes caused by weightlessness. But Adey himself is well aware that such studies on a terrorized animal are rendered unreliable and invalid by the animal's fear. Some of Adey's cruelest experiments on animals involve vibration." (Report, p. 5)

d. "When the dimensions of the thinboned head of a 14-pound monkey like Bonny are compared with those of man, it is clear that the great need is for science to replace the kind of savagery practiced by Adey." (Report, p. 6)

e. "But as we see, in 1969 Adey's methods haven't changed for the better." (Report, p. 8)

f. "While Adey and his colleagues continue to cling to their old research methods, scientists at the University of Wisconsin have developed what they call a 'Neurister' which can function like the gray matter of the human brain." (Report, p. 8)

g. "THIS REMARK DEMONSTRATES PRETTY CLEARLY THAT ADEY'S EXPERIMENT ON BONNY WAS PURE SAVAGERY, NOT PURE SCIENCE." (emphasis in the original) (Report, p. 9)

h. "Over the years, well supplied with money from the U.S. Air Force and NASA, Adey has performed a wide variety of exceedingly cruel animal experiments, including the vibration of live animals with electrodes in their brains in the name of 'brain research.'" (Report, p. 12)

i. "Has Adey qualified himself to use this modern and precise research? Apparently not." (Report, p. 12)

j. "But while the National Aeronautics and Space Administration boasts some of the finest scientists in the world, this agency continues to support men like

> Dr. W. Ross Adey, who masterminded Bonny's flight, and his animal-using colleagues who use computers only for data processing of their same old animal experiments—or what can be called veterinary research." (Letter, front side)

Thus, in general, the publications questioned plaintiff's competence in the preparation of the Bonny flight, and charged that the Bonny experiment was cruel and abusive to animals; that it was "pure savagery"; and that plaintiff had a long history of abuse to animals, having "performed a wide variety of exceedingly cruel animal experiments." Plaintiff alleges that the statements were false and defamatory, published with actual malice, with knowledge that such statements were false or with the deliberate and malicious purpose and intent to injure him and to deprive him of his good name and reputation as an individual and a professional researcher. He seeks compensatory damages in the sum of one million dollars and punitive damages in a like amount.

The defendants originally denied the statements were defamatory in reference to plaintiff; additionally, they pleaded affirmative defenses of truth, the privilege of fair comment and constitutional protection under the First and Fourteenth Amendments.

Upon the trial, the claim of alleged defamatory matter was narrowed. Plaintiff withdrew his allegations as to the statements designated above as subparagraphs (e), (f) and (i). The defendants conceded that the remaining statements complained of, with the exception of subparagraphs (c) and (j) were defamatory of plaintiff. As to the latter paragraphs, the defendants, while not retreating from their original position that they were not defamatory, acknowledged that a reasonable finder of fact could conclude they tended to derogate plaintiff's reputation. The issues to be decided by the Court have been further narrowed by the

acknowledgment that plaintiff was a public figure and that the flight was a matter of public interest. Indeed, this could not be challenged. The flight was widely publicized and received much attention by all the news media; it drew marked differences of opinion; many questioned the expenditure of ninety-two million dollars of government funds in the light of what they termed more pressing and desirable domestic and social welfare programs. The plaintiff's status placed upon him, under the rule established by *New York Times Co.* v. *Sullivan*,[2] the burden to prove with "convincing clarity"[3] that the defamatory matter was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not,"[4] unless the constitutional privilege enunciated in that case is inapplicable—a claim made by plaintiff.

The plaintiff's contention that there is a category of libel which is beyond constitutional protection, as plaintiff terms it, "private libel," is based upon dictum in Mr. Justice Harlan's plurality opinion in *Curtis Publishing Co.* v.

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[2] 376 U.S. 254 (1964). The development of the *Times* doctrine can be traced through the following decisions:

Garrison v. Louisiana, 379 U.S. 64 (1964); Linn v. United Plant Guard Workers, 383 U.S. (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967 (extended the *Times* rule to public figures); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[3] 376 U.S. at 285-86; *see* Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). The phrase "clear and convincing proof" was later adopted. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30, 52 (1971).

[4] 376 U.S. at 280.

Butts,[5] which suggests such an exception may be warranted depending upon the relative opportunities of the public figure and the private individual to rebut the charges which constitute the alleged libelous material. Based thereon, plaintiff claims that since the UAA publications were mailed to its 2500 members and 500 selected organizations and were not distributed publicly, and not possessing a list of those receiving the documents, he did not have an opportunity to respond to the charges;[6] accordingly, he urges that the defense of constitutional privilege is unavailable to these defendants.[7]

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[5] 388 U.S. 130, 154-55 (1967):

> "The courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. . . . We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest *and had sufficient access to the means of counterargument* to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements. . . ." [Emphasis added.]

See also Time, Inc. v. Hill, 385 U.S. 374, 391 (1967).

[6] However, Dr. Adey testified that he never requested a mailing list from the defendants.

[7] Recently the New York Court of Appeals rejected a somewhat similar argument with respect to a congressman's press release to his constituents. Trails West, Inc. v. Wolff, —— N.Y.2d —— (1973). It should be noted that previously when the word private was used in the libel area, it appeared to refer to the subject matter or target of the alleged defamatory statements, not to the audience

I find this attempt to engraft an exception to the constitutional privilege, so strongly enunciated under *New York Times* and its progeny, without substance for a number of reasons. First, the Supreme Court, as plaintiff's counsel recognize, has never ruled directly on this issue. Moreover, considering the First Amendment basis of the *New York Times* decision and that Court's recognition "of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[8] only the clearest doctrinal trend favoring the exception would justify a district court judge in affording it recognition.[9] No such trend is discernible.[10]

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receiving them. *See* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); *cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 & n.12 (1971); Buckley v. Esquire, Inc., 344 F. Supp. 1133, 1134 (S.D.N.Y. 1972); Trails West, Inc. v. Wolff, *supra.*

[8] 376 U.S. at 270.

[9] Note that Justice Harlan in *Butts* stated that "[n]othing in this opinion is meant to affect the holdings in *New York Times* and its progeny . . ." 388 U.S. at 155.

[10] This Court is aware of recent holdings that the constitutional protection is not available where the defamatory material is contained in a private subscription credit report distributed only to the mercantile agency's subscribers. *E.g.*, Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971), *cert. denied,* 405 U.S. 1026 (1972); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir.), *cert. dened,* 404 U.S. 898 (1971); Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170 (N.D. Ga. 1971). However, the material disseminated by the defendants in the case at bar is not of the confidential and restricted nature as was that involved in the above cases; nor did they deliberately attempt to prevent anyone interested from obtaining the publications; further, as stated *infra,* plaintiff possessed the means to respond to the defendants' charges. *Compare* Grove v. Dun & Bradstreet, Inc., *supra* at 437. *See* 404 U.S. at 906 (Douglas, J., dissenting from denial of certiorari).

Second, Dr. Adey, in view of his official status with NASA and his leadership in the preparation of Bonny for the flight, clearly comes within the definition of a public official (as distinguished from a public figure).[11] As a public official he had access to the "means of counter-argument."[12] The Bonny flight attracted so much publicity and aroused such controversy that there can be little doubt Dr. Adey readily could have commanded news media interest and availed himself of a public forum to answer the attack of the defendants. After Bonny's death the venture remained one of continuing public interest and controversy, including a congressional inquiry into such experiment, at which Dr. Adey appeared as a witness.[13] Moreover, he could, without difficulty, have reached his professional colleagues and the university community. And even if Dr. Adey could not have commanded equal media attention in efforts to negate the defendants' charges, this would not diminish the defendants' constitutional protection. As Mr. Justice Brennan recognized: "[I]t is the rare case where the denial overtakes the original charge. Denials, retractions and corrections are not 'hot' news. . . . [T]he unproved, and highly improbable, generalization that

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[11] "Public officials" are so labelled by reference to their position and responsibility in government. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966); New York Times Co. v. Sullivan 376 U.S. 254 (1964); *see also Barr v. Matteo*, 360 U.S. 564, 572-75 (1959). One who does not hold a place in government, and yet commands substantial public interest either by position in the community alone, or by "purposeful activity" is subject to the "public figure" classification. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); *cf.* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324 (1966), *vacated and remanded on other grounds*, 387 U.S. 239 (1967).

[12] Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

[13] *See* Hearings Before the Subcomm. on Space Science & Applications of the House Comm. on Science & Astronauts, 91st Cong., 1st Sess. (1969). The hearings were conducted during mid-November 1969.

an as yet undefined class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matter seems too insubstantial a reed on which to rest a constitutional distinction." [14]

Finally, as plaintiff's counsel conceded in response to the Court's inquiry, if these defendants, instead of distributing the publication to their own membership, urging them to write to members of Congress, had advertised in a newspaper or broadcast an appeal to the public to do so, they would qualify for the constitutional protection. It would indeed be a strange and anomolous doctrine to deprive them of that protection because they limited the "Call to Action" to fellow members interested in animal welfare instead of broadcasting it to the general public. In sum, the Court holds that since plaintiff was a public figure and the publications involved matters of public concern and controversy, defendants are entitled to rely upon the defense of constitutional protection under the First Amendment.

Accordingly, we turn to the basic issues. The task of the Court as the fact finder has been simplified by counsel, who with a fine professional attitude concurred in the view that the Court first consider whether plaintiff has carried his burden on the "knowing or reckless-falsity" issue by that "clear and convincing proof" [15] required under the constitutional standard. In the event he has failed to sustain this burden, the parties are agreed there would be no need to pass upon the alleged falsity of the defamatory statement or those claimed to be so, or to consider the defenses of truth and fair comment.

Plaintiff does not contend, and the evidence does not support a finding, that the defendants acted with actual knowledge that the defamatory material was false. The

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[14] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46-47 (1971).

[15] *Id.* at 30, 52.

issue rather is whether the defendants acted with "reckless disregard of whether it was false or not." The Court, as the finder of fact, "must determine whether the publication was indeed made in good faith."[16] There is, of course, no precise yardstick to determine the issue with each case turning upon its own individual facts. As was recognized in *St. Amant* v. *Thompson*, "[r]eckless disregard . . . cannot be fully encompassed in one infallible definition."[17] However, the facts of that case give direction as to what is required to establish reckless disregard. The Louisiana Supreme Court based its ruling that St. Amant had broadcast false information about Thompson recklessly (though not knowingly) upon several factors, including: (1) St. Amant had no personal knowledge of Thompson's activities; (2) he relied solely upon an individual's affidavit, although there was no evidence of that person's reputation for veracity; (3) he failed to verify his information with those who might have known the facts; and (4) he gave no consideration to whether or not his statements defamed plaintiff and went ahead heedless of the consequences.[18] The Supreme Court held that those considerations fall short of proving the defendant's reckless disregard for the accuracy of his statements about plaintiff. The Court, citing its own leading cases on the subject,[19] as furnishing

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[16] St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[17] 390 U.S. 727, 730 (1968).

[18] *Id.*

[19] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (plaintiff failed to satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information); Garrison v. Louisiana, 379 U.S. 64 (1964) (necessity for showing that a false publication was made with a "high degree of awareness of . . . probable falsity"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967) ("despite the publisher's awareness of probable falsity," evidence of either deliberate falsification or reckless publication was essential to recovery by public officials).

meaningful guidance, stated they make it "clear that reckless conduct is not measured by whether a reasonably prudent man[20] would have published, or would have investigated before publishing," but that there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[21] Finally, it cautioned that mere profession by a defendant of good faith or that he believed his statements were true would not be a sufficient defense, especially if his statements are a "product of his imagination" or so "inherently improbable that only a reckless man would have put them in circulation."[22] Thus, the issue here is not whether the admittedly defamatory statements or the others as to which there is an issue were true,[23] or were defendants' views of plaintiff and his experiments justified, or whether they should have been verified prior to publication—rather it is whether in fact they seriously doubted the accuracy of their statements about plaintiff.[24]

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[20] The Court has firmly adhered to its rejection of the "reasonably prudent man" standard in order to assure full protection under the First Amendment. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52, 56 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964).

[21] 390 U.S. at 731.

[22] *Id.* at 732.

[23] "Truth or falsity . . . is not the constitutional test." Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 867 (5th Cir. 1970). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964), Time, Inc. v. McLaney, 406 F.2d 565, 570 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

[24] *See* Waskow v. Associated Press, 462 F.2d 1173, 1175 (D.C. Cir. 1972) (per curiam); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 866 (5th Cir. 1970). In the case at bar, the Court is dealing to a large extent with charges of cruelty, savagery and abuse to animals—accusations which cannot be objectively analyzed in the same manner as charges of criminal conduct, unfitness to hold office or matters of public health.

A review of all the relevant trial evidence including the demeanor of witnesses, compels a finding that the plaintiff has failed to sustain his burden of proof. The evidence does not establish with "convincing clarity" that the defendants entertained serious doubts as to the truth of their statements or that they had "a high degree of awareness of their probable falsity." To the contrary, they asserted their continuing belief that the statements in the UAA publications were true and the evidence supports a finding that it was a sincere and genuinely held view. This belief was not drawn out of thin air or a product of their imaginations or contrived as a defense to plaintiff's charge. The individual defendants have been associated with what is referred to as the humane movement for many years and the UAA was organized under their sponsorship in 1967 to disseminate information of alternatives to the use of animals in research. Simply stated, they are opposed to the use of animals in research based upon a firm belief that effective alternative methods of research are available. Literature and bulletins pertaining to the subject of the defendants' main interest are distributed fairly regularly to the UAA's approximately 2500 members and about 500 humane societies. The defendant Seiling, in pursuit of her interest in the welfare of animals, has through the years collected articles written and published by various experimenters, including a number by Dr. Adey. The collection includes many papers on alternative methods to the use of animals for experimentation, such as physical and mathematical modeling, tissue and culture techniques and modern and sophisticated instruments. Some of the material comes from the United States Department of Commerce which issues technical journals; also from medical, scientific and technical articles on animal and non-animal techniques.

The articles here at issue were prepared in the main by the defendant Seiling with the research and editorial assistance of the defendant White. In large measure, they

relied upon their general store of information contained in the accumulated library material. A principal thrust of the publications was that Bonny had suffered and died in vain—it was directed against experimenters' adherence to medicine's age-old techniques and tradition in the use of animals for research instead of the use of more modern and technical methods. In substance, they charged that countless other animals will continue to suffer and die because, as defendants stated: "[The] nation's military-space research on biological systems is being done by animal experimenters using outdated methods instead of by scientists educated to use advanced techniques." The statements in the publications as to Dr. Adey were subjective conclusions based upon substantially accurate information on the "technical" aspects of the Bonny experiment, and statements by persons in the same and related fields of study as the plaintiff, as well as articles written or co-authored by Dr. Adey during the period from 1956-1965. We need only examine brief excerpts, cited below, of those articles by Dr. Adey to appreciate the impact upon, and the reaction of, the defendants or the average layman concerned with the welfare of animals, after reading them:

(a) In discussing an experiment in which portions of phalangers' brains were removed, references were made to "roughly assault[ing the animals] with a large cloth bundle"; the application of "noxious stimuli"; the animals experiencing frequently generalized convulsions, and that the animals were "prodded with a stick" or subjected to "painful stimulation of the tail or paw."

(b) In describing the results of an experiment which involved injecting calcium chloride into a cat's brain tissue it was stated: "With repeated injections of calcium chloride . . . epileptic seizures were observed after three to five injections. In some cases, generalized convulsions led to the death of the animals."

(c) One article, describing experiments during which monkeys were subjected to varying degrees of vibration, mentioned "one instance, [where] the anesthetic

state was terminated by intracardiac injection of potassium chloride, which produced cardiac arrest."

(d) Two articles described the effects of various drugs, including LSD 25, on cats' behavior. There are references to the cats exhibiting "bizarre" behavior; statements that the animals remained in "catatonic postures" and shook their heads "violently against unseen objects."

In addition to the foregoing, the accounts of the Bonny experiment describe the surgical implantation of electrodes into the monkey's brain and catheters into its main arteries, inserted through its upper legs.[25] Moreover, since we are dealing with defendants' state of mind, it is significant that defendant Seiling's opinion was that *any* animal experimentation is "savage" and "cruel" since she believes there are adequate alternative methods of research. Finally, evidence was introduced which demonstrated that plaintiff's experiments were subject to criticisms, direct and indirect, from other observers, including professional contemporaries of plaintiff, who differed with him. The opinion the defendants had of the experiment and the methods used to instrument the monkey was one on which reasonable persons, professional and lay, could have differing points of view. The above convincingly establishes that defendants' statements and conclusions were not wholly fabricated nor inherently improbable.[26] In sum, the Court finds that while

[25] At trial Dr. Adey explained the significance of several statements in his articles—i.e., that "painful stimulation" consisted of squeezing the tail or paw of the animal, and that mention of epileptic discharge and seizures in one article did not relate to visible ("clinical") epileptic "fits". Defendants, however, did not have the benefit of these explanations when the publications in issue were written and it is their state of mind at that time which is controlling.

[26] At least one of defendants' statements [(a) in the complaint] questions the plaintiff's professional competency. However, such statements were not wholly unreasonable in light of Dr. Adey's own statement that it was a "complete mystery" to him why Bonny "should have gone so soon so fast" and the general criticism of his experiments.

the publication used strong and robust terms, it was made in good faith.

Men in public life, whether they be judges, legislators, executives or scientists, must accept as an incident of their service harsh criticism, ofttimes unfair and unjustified—at times false and defamatory—and this is particularly so when their activities or performance may be the subject of differing attitudes and stir deep controversy. While it is not pleasant to be the target of false and defamatory charges, officials must be "able to thrive in a hardy climate,"[27] and their personal injury and hurt must yield to the higher purpose of assuring citizens freedom of expression. Dissent and the right to criticize those in public life are of the essence of the democratic process.[28] It is only when false, defamatory matter is rooted in actual malice that the constitutional privilege must yield. This is not such a case.[29]

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[27] Craig v. Harney, 331 U.S. 367, 376 (1947).

[28] *Cf.* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[29] Plaintiff places substantial reliance on Goldwater v Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). However, this Court does not find that decision to be controlling in light of the significant differences in the evidence adduced in each case. At best, plaintiff has established circumstances similar to those in the *St. Amant* case, which, as noted previously, the Supreme Court determined were inadequate to sustain a finding of reckless disregard. Also inapposite are the decisions in Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) (author's reliance upon presumptions and distortion), and Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.D.C. 1972) (actual awareness of information which would cause serious doubt as to the validity of the charges made against the plaintiff).

Judgment may be entered in favor of the defendants in accordance with the foregoing.

The foregoing shall constitute the Court's Findings of Fact and Conclusions of Law.

Dated: New York, N.Y.
June 25, 1973

EDWARD WEINFELD
United States District Judge

SUPREME COURT, U. S.

JUL 31 1974

MICHAEL RODAK, JR., CLE

IN THE

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OCTOBER TERM, 1974

No. 73-1959

WILLIAM ROSS ADEY, *Petitioner*,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should disturb the findings of the two courts below that petitioner, the plaintiff in a libel action, is a public figure.

2. Whether the constitutional protection afforded by this Court's decisions in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny applies to a publication disseminated by a humane organiza-

tion to 2,500 subscribers and 500 libraries, where (a) the publication exhorted its readers to write their Congressmen and Senators in an effort to terminate appropriations of public money for research involving animal experimentation, (b) the plaintiff in a libel action predicated on the publication had vastly superior access to the news media and was invited to testify on the subject of the publication before a congressional committee, and (c) the plaintiff admitted that he never sought access to the humane organization's mailing list to distribute a reply.

STATEMENT

On June 28, 1969 a fourteen-pound pigtail macaque nicknamed "Bonny" was propelled into earth orbit by a group of scientists working with the National Aeronautics and Space Administration (NASA). The flight, which was part of a series of animal space experiments, received widespread newspaper and media publicity and involved the expenditure of $92 million in tax money.

The petitioner, an internationally famous research neurologist, supervised the experiment for NASA. (Tr. 199-200) [1] He spent six weeks living at Cape Kennedy preparing the monkey for flight, and assisted over the course of many months in the design of the miniature space capsule. (Tr. 198-209)

Bonny's flight was designed to last thirty days and to test the effect of prolonged weightlessness upon the monkey's sleep patterns and certain physiological functions. After eight days in space, Bonny's physical condition suddenly deteriorated and he was brought back to earth where he died a few hours after recovery.

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[1] Citations to "(Tr. —)" are to the transcript of the trial.

Immediately after Bonny's death, petitioner called a press conference and announced that he was utterly at a loss to explain the monkey's rapid decline and demise. (J.A. 72-73) [2]

The Bonny trip immediately became the subject of considerable controversy. The experiment was criticized, not only by various organizations in the animal welfare movement (J.A. 155, 212), but also by the news media (J.A. 70-71); by Col. John Powers, long famous as the voice of Mission Control on manned space flights (J.A. 157); by NASA's Deputy Director for Medical Research (J.A. 163); and by staff doctors at the Manned Space Flight Center in Houston. (J.A. 162)

Much of the criticism embodied the view that the animal was so heavily instrumented and subject to such severe stress from the unnatural environment that any findings from the experiment were without significant medical value. This criticism was even expressed by one of petitioner's colleagues in the Bonny experiment. (J.A. 186-89)

As a result of the controversy, petitioner was called to testify before the congressional subcommittee which oversees NASA projects. (J.A. 150-51) He attempted to answer the widespread public criticism of the Bonny experiment and to salvage appropriations for future animal experiments. [3]

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[2] Citations to "(J.A. —)" are to the Joint Appendix in the Court of Appeals.

[3] See *Hearings Before the Subcommittee on Space Science & Applications of the House Committee on Science & Astronauts*, 91st Cong., 1st Sess. 71-102 (1969) [hereinafter cited as *House Hearings*].

Shortly after the Bonny flight respondent United Action for Animals (UAA) published a fourteen-page report strongly critical of the experiment. (J.A. 7-20). The report was prepared by respondents Eleanor Seiling and MacDonald White, president and vice president respectively of UAA. It was disseminated through the UAA's mailing list to the organization's roughly 2,500 members and to approximately 500 other humane societies and libraries. The report was accompanied by a "Call to Action" which exhorted readers to write their Senators and Congressmen urging a cut-off of appropriations for such animal space experiments in the future. (J.A. 21-22)

After a description of the Bonny experiment, the accuracy of which has never been challenged, the report argued that the experiment was cruel to the animal, noting that the jungle-bred monkey was strapped to a couch and virtually immobilized within a tiny space capsule, with many measuring devices attached to and implanted in its body, including numerous electrodes in its brain, a catheter in its heart, another in its bladder and four tubes (two in each leg) leading from its thighs along the femoral arteries to the heart. The report also suggested that the experiment was inadequately controlled to permit the gathering of reliable data, pointing to published scientific criticism of the heavy instrumentation and unnatural circumstances in which the monkey was placed. The report also suggested that the experimenters should have attempted to proceed by alternative methods, including computer modeling. Finally, it attacked the expenditure of $92 million in tax money for the experiment.

The report named petitioner as the superintendent of the experiment and contained a number of state-

ments critical of his role. The central focus for the bulk of the testimony at the trial was the report's accusation that petitioner "has a long history of abuse of animals." (J.A. 9)

Petitioner brought suit for libel in the United States District Court for the Southern District of New York. The respondents defended upon the grounds that the statements complained of were true and that they were in any event privileged both under the New York law of fair comment and the First Amendment privilege established by *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny.

At trial it was demonstrated that the basic criticisms of the report echoed beliefs held by substantial segments of the scientific community. (J.A. 160-63, 183, 186-89, 212) With respect to the charge that he "has a long history of abuse of animals," petitioner admitted on cross-examination that between 1956 and 1969 he engaged in extensive animal experiments which involved, *inter alia*:

—the administration of LSD to cats and the observation of their "bizarre behavior," which included remaining in catatonic postures and shaking their heads "violently against unseen objects" (J.A. 119-20, 214-15);[4]

—the repeated administration of calcium chloride to cats under circumstances where petitioner was aware that epileptic seizures would probably be produced, which seizures sometimes resulted in generalized convulsions and death for the animals (J.A. 232-34);

—the removal of portions of the brains of 29 phalangers (small Austrialian marsupials) and

[4] In his article describing this experiment petitioner remarked that "cats under LSD are as much fun as human beings." (J.A. 214)

the subsequent administration of "painful and noxious stimuli," including pinching their tails and paws, prodding them with sticks and "roughly assaulting"[5] the animals with bundles of cloth in order to test the aggressiveness of their reactions (J.A. 215-25);[6]

—the centrifuging of cats and monkeys, involving the application of forces of up to ten to twelve times the force of gravity, with resultant loss of consciousness on the part of the animals (J.A. 258-60);

—the isolation of newborn monkeys in darkness and silence for a year (Defendants Exhibit 0).

Respondent Seiling testified that in preparing the UAA report she consulted not only press reports of the Bonny experiment and published lay and scientific criticism of the experiment (J.A. 66-78), but also an extensive collection of scientific articles dealing with animal experimentation, including specifically petitioner's own writings describing the experiments mentioned above and others (J.A. 55-56, 315-29). Respondents Seiling and White both testified that they believed all statements in the report to be true when they published it and that they continued to hold that belief. (J.A. 62, 94, 339)

Petitioner sought to rebut the charge that his experiments were cruel with testimony from his colleagues at the UCLA Brain Research Institute to the effect

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[5] The terms in quotation marks are petitioners's own words taken from his report of the experiment.

[6] Petitioner admitted that at least one of the phalangers in this experiment suffered repeated generalized convulsions after the portion of its brain had been removed. (J.A. 223) He described such convulsions as "one of the general problems of brain surgery." (J.A. 224) Of course, much of petitioner's work involves brain surgery on animals for experimental purposes.

that his animals were adequately cared for before and after his experiments and that he always took reasonable steps to minimize the pain and discomfort to which they were subjected by the experiments. However, these witnesses admitted that the experiments involved the knowing infliction of pain upon the animals (J.A. 102), and that the concept of cruelty "is a matter on which reasonable men may differ." (J.A. 308, 106-07) With respect to the administration of drugs under circumstances where the experimenter knows that convulsions are likely to be produced, one of petitioner's expert witnesses testified:

> where this is done, and done carefully and without undue pain . . . I do not consider it to be cruel, but I know many people do consider it to be cruel . . . .

(J.A. 107)

Petitioner himself admitted that someone with a point of view different from his own could call the phalanger experiment abusive. (J.A. 224-25)

Following the close of testimony, petitioner conceded that he was a public figure within the meaning of this Court's First Amendment libel decisions and that the experiment was a matter of public controversy. He argued, however, that the *New York Times* privilege was inapplicable because this was a "private" libel in light of the limited distribution of the report and petitioner lacked "sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (opinion of Harlan, J.). Alternatively, petitioner argued that he had satisfied the *New York Times* test for "actual malice" because the evidence showed the

publication was made with reckless disregard for the truth.

The Honorable Edward Weinfeld, sitting without a jury, found petitioner to be a public official (Pet. App. 9a) [7] and rejected his argument that the privilege was inapplicable because of the limited dissemination of the report and his purported lack of access to the "means of counterargument." The court noted in this regard petitioner's easy access to the news media and to a congressional forum and his admitted failure to request use of the UAA mailing list to disseminate a reply. (Pet. App. 7a-10a & n. 6)

Judge Weinfeld then found that petitioner had failed to demonstrate reckless disregard for the truth:

> The evidence does not establish with "convincing clarity" that the defendants entertained serious doubts as to the truth of their statements or that they had "a high degree of awareness of their probable falsity." To the contrary, they asserted their continuing belief that the statements in the UAA publications were true and the evidence supports a finding that it was a sincere and genuinely held view. This belief was not drawn out of thin air or a product of their imaginations or contrived as a defense to plaintiff's charge.
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> * * *
>
> Finally, evidence was introduced which demonstrated that plaintiff's experiments were subject to criticisms, direct and indirect, from other observers, including professional contemporaries of plaintiff, who differed with him. The opinion the defendants had of the experiment and the methods used to instrument the monkey was one

[7] Citations to "(Pet. App. —)" are to the Appendix to the Petition for a Writ of Certiorari.

> on which reasonable persons, professional and lay, could have differing points of view. The above convicingly establishes that defendants' statements and conclusions were not wholly fabricated nor inherently improbable. In sum, the Court finds that while the publication used strong and robust terms, it was made in good faith.

(Pet. App. 13a, 15a-16a)

The Second Circuit affirmed Judge Weinfeld's ruling from the bench without opinion. (Pet. App. 1a)

REASONS TO DENY THE WRIT

1. This case presents no issue under this Court's recent ruling in *Gertz* v. *Robert Welch, Inc.,* 42 U.S.L.W. 5123 (U.S. June 25, 1974).

This Court for the first time in *Gertz* established a comprehensive conceptual framework for the analysis of libel problems in light of First Amendment values. It held that the *New York Times* privilege is applicable in libel actions brought by public officials and public figures, thus requiring such persons to demonstrate that the publications complained of were false and were made with actual knowledge of falsity or reckless disregard for the truth. Private individuals who through no action on their own part become involved in public controversy may recover on a lesser showing to be established by state law, though even in such cases liability may not be imposed without fault. The protection of First Amendment interests was further held to require certain restrictions upon the award of damages in libel suits by private individuals.

In an effort to state an issue under *Gertz,* petitioner has attempted to inject a wholly nonexistent ambiguity

into the nature of his concession in the trial court and the findings of Judge Weinfeld. The thrust of his argument is that the applicable law at the time of trial was stated in the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), which was rejected by the Court in *Gertz*. In light of *Rosenbloom*, petitioner now states, he was forced to concede in the trial court *either* that he was a public figure *or* that the matter was one of substantial public controversy. He then argues:

> in light of the fact that petitioner conceded no more than that he was *either* a public figure or involved in a matter of public interest, the district court's statement that Dr. Adey acknowledged he was one or the other cannot fairly be construed as a factual finding that Dr. Adey was a public figure.

(Petition at 6 n.5) (emphasis in original) Thus petitioner asks that the judgment be vacated and remanded for a finding on this issue.

The ambiguity on which petitioner predicates his entire argument in this Court simply did not exist, either in his concession or in Judge Weinfeld's findings. The opening sentence of petitioner's post-trial brief in the District Court reads: "The plaintiff has conceded that he is a 'public figure' as that term is contemplated in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)." (Plantiff's Post-Trial Brief on Requested Points of Law at 1) This concession was not qualified or hedged about in any manner, as indeed it could not have been in view of the record.

Moreover, Judge Weinfeld did not predicate his ruling upon an ambiguous finding that the *Times*

privilege was applicable under *either Butts* (public figure) *or Rosenbloom* (public issue). He found instead that

> Dr. Adey, in view of his official status with NASA and his leadership in the preparation of Bonny for the flight, clearly comes within the definition of a public official (as distinguished from a public figure).

(Pet. App. 9a) (footnote omitted).[8]

The remainder of petitioner's belated attempt to argue for "private" status is marred by other distortions of the record. For example, petitioner states:

> For all the record shows, petitioner's only role was in conducting the experiment prior to the launch of the monkey into space, rather than attempting "to engage the public's attention" to influence support of the experiment.

(Petition at 14)

With all due respect, the record shows considerably more than that. It is undisputed that petitioner was the spokesman of the experiment and that in this role he called a nationally reported press conference immediately following the monkey's death. (J.A. 72-73) Not only that, but in an effort to salvage congressional appropriations for animal space experiments at a time when they were under heavy attack, petitioner appeared

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[8] Judge Weinfeld also relied upon petitioner's concessions:

> The issues to be decided by the Court have been further narrowed by the acknowledgement that plaintiff was a public figure *and* that the flight was a matter of public interest.

(Pet. App. 5a-6a) (emphasis added). This is hardly an ambiguous *either-or* declaration which might be affected by this Court's decision in *Gertz*.

voluntarily before a Committee of the Congress and attempted precisely "to engage the public's attention to influence support of the experiment." (Tr. 229-30; see *House Hearings*)

Thus it is clear from the record that petitioner was not a hapless private individual sucked into the whirlpool of public controversy by events beyond his control. In this Court's language in *Gertz,* petitioner is one of those who "have thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved." 42 U.S.L.W. at 5130; see *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967) (opinion of Harlan, J.); *Walker* v. *Pulitzer Publishing Co.,* 394 F.2d 820, 805 (8th Cir. 1968); *Pauling* v. *Globe-Democrat Publishing Co.,* 362 F.2d 188 (8th Cir. 1966).

Petitioner conceded in the trial court that he was a "public figure" as that term is contemplated in the *Butts* decision. Indeed, he could hardly have done otherwise in view of his prominence, not only in the scientific community, but in the public press as well. The decision in *Gertz* explicitly leaves standing the holding in *Butts* that public figures may not recover for libel absent a showing of reckless disregard for the truth.[9] The findings of the two courts below regarding petitioner's status are plainly supported by substantial evidence in the record, and there is no occasion for further review in this Court.[10]

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[9] We do not understand petitioner to attack in this Court the findings of both courts below that he failed to establish *New York Times* "malice."

[10] In light of his concession and of petitioner's obvious status as a public figure, it is unnecessary to consider whether, as respondents have contended throughout and as the trial court found, he was also a public official. As the man in charge for NASA of a $92 million public tax money venture, petitioned would seem

2. There is no issue of "private libel" involved in this case.

Petitioner seeks to argue in this Court that the *New York Times* privilege is somehow rendered inapplicable by the relatively limited dissemination of the UAA report. His arguments on this subject are internally inconsistent. First, he claims that there is a category of "private libel" in which the *New York Times* privilege is inapplicable because the publication was not part of a public controversy, relying upon *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971), which involved a confidential financial report. At the same time, petitioner argues that the *Times* rule should be inapplicable because he lacked "sufficient access to the means of counterargument" in the public debate, relying upon a dictum taken out of context from Mr. Justice Harlan's opinion in *Butts*. See 388 U.S. at 155. [11]

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clearly to meet the test of substantial responsibility for the conduct of public affairs. See *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

Moreover, as petitioner himself notes (Petition at 3), he has served prominently as a "consultant" to such government agencies as the National Institutes of Health, NASA, the Atomic Energy Commission, and the President's Science Advisory Committee. (Tr. 147-48) The record is silent on the nature of petitioner's duties in these consulting positions, or the extent of his remuneration, but it hardly lies in petitioner's mouth at this stage to minimize his status with these governmental agencies in an effort to attack a finding which he did not dispute at any point below. There is, in short, no record support whatever for petitioner's assertion that "he is not and has not been an official of any of these government agencies." (Petition at 3)

[11] Mr. Justice Harlan was not arguing that every imbalance in access to public media should result in a refusal to apply *New York Times*. Instead, he suggested that relative general access to the media was one factor among several which led him to conclude that public figures should be able to recover for libel upon showing something less than reckless disregard for the truth. That position, of course, was rejected in *Butts*, and that rejection was reaffirmed in *Gertz*.

The short answer to petitioner's argument is that he is wrong on both counts. The UAA report, despite its relatively limited dissemination, was very much part of a major public controversy. The report, while not distributed directly to the press, called upon its roughly 3,000 readers to undertake a letter-writing campaign to their congressmen to put an end to appropriations of public tax money for medical research experiments upon animals. To compare such a document to a privately distributed, confidential Dun & Bradstreet credit report is absurd.

Moreover, there is no support whatever in the record for petitioner's claim that he in fact lacked access to the "means of counterargument." As Judge Weinfeld found:

> The Bonny flight attracted so much publicity and aroused such controversy that there can be little doubt Dr. Adey readily could have commanded news media interest and availed himself of a public forum to answer the attack of the defendants. After Bonny's death the venture remained one of continuing public interest and controversy, including a congressional inquiry into such experiment, at which Dr. Adey appeared as a witness.

(Pet. App 9a)

Moreover, even if the UAA mailing list could be considered the relevant "medium" for counterargument, there is no showing that petitioner was denied access to it. Indeed, the record establishes the contrary:

> Q. Did you, Doctor, seek to go to Miss Seiling, UAA or MacDonald White and ask for a mailing list from them for a right of reply to the people that they had sent out their sheets to?
>
> A. No.

(J. A. 199)

Finally, Judge Weinfeld found:

> If these defendants, instead of distributing the publication to their own membership, urging them to write to Members of Congress, had advertised in a newspaper or broadcast an appeal to the public to do so, they would qualify for the constitutional protection. It would indeed be a strange and anomolous doctrine to deprive them of that protection because they limited the "Call to Action" to fellow members interested in animal welfare instead of broadcasting it to the general public.

(Pet. App. 10a)

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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